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No. 81-152

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX, and ROBERT W. McLALLEN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HARRIS TRUST AND SAVINGS BANK, PULLMAN BANK AND TRUST COMPANY, CENTRAL NATIONAL BANK IN CHICAGO and **AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO,**

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In this private antitrust case, petitioners alleged that the respondent banks had conspired to fix the interest rates that they charged to their respective credit card holders for deferred payment privileges. Concluding that there was no significant probative evidence of any conspiracy to fix interest rates, the district court granted summary judgment for the banks. The judgment was affirmed by the court of appeals, with one judge dissenting.

The question presented to this Court is whether the court of appeals, in analyzing the particular record in this case, properly applied the principles governing summary judgments reiterated by this Court in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), in determining that the petitioners had submitted no significant probative evidence of conspiracy involving the banks. A subsidiary aspect of this question is whether the court of appeals properly dealt with two evidentiary issues raised by petitioners relating to certain lobbying activities of the banks and to an affidavit submitted by petitioners' economist.

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STATEMENT OF THE CASE

Introduction

This case was initially filed in 1970 by a charge card holder of respondent Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank"), a founding member of the Midwest Bank Card System, Inc. ("Midwest"), which was a predecessor of the Mastercharge (now MasterCard) bank credit card system. The original plaintiff, later joined by two other Continental Bank cardholders (the three petitioners here), alleged various violations by the

respondent banks of Section 1 of the Sherman Act, 15 U.S.C. § 1. The specific question upon which review is sought in this Court is whether petitioners, in opposing the banks' motions for summary judgment, presented significant probative evidence to support their allegations that the banks conspired to fix the rate of interest charged for extended payment privileges available to holders of bank credit cards at 1½% per month or 18% per year.

Subsequent to the filing of the complaint, petitioners conducted virtually unlimited discovery for several years, including at least 71 depositions, 297 interrogatories, 128 requests for admissions, and innumerable document production requests. 467 F. Supp. at 208 (Pet. App. B-26-27).* In 1978, in an answer to interrogatories propounded by Continental Bank, petitioners identified some 964 documents and 53 witnesses (many of whom were present or former employees of the banks) which would be offered or presented at trial to support their allegations of unlawful conspiracy. *Id.* At this point the banks moved for summary judgment, contending that there was nothing in petitioners' designated evidence that rose to the level of significant probative evidence of a conspiracy to fix interest rates.

When the district court decided the motions for summary judgment,** all of petitioners' documents and the lengthy depositions of substantially all of petitioners' witnesses were

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*The "Pet. App." citations are to the Appendix attached to the Petition for Certiorari.

**The Petition notes that, prior to the time that Judge Leighton granted the present motions for summary judgment, Judge McMillen had denied prior motions made by two of the banks. Petition, pp. 4-5; Pet. App. D-1, E-1. Petitioners fail to reveal that these interim rulings were made in 1974 and 1976 prior to the time that critically important discovery had occurred, including the petitioners' answers to Continental Bank's interrogatories which defined with specificity the evidence upon which petitioners intended to rely at trial to support their conspiracy allegations.

before that court; they were also before the court of appeals on review. In this extensive collection of discovery materials, petitioners could point "to only two instances where interest rates were even discussed, and then only in the context of state usury laws, or the rate that Bank Americard was charging." 641 F.2d at 464 (Pet. App. A-18-19).*

Background of the Case

As the Petition correctly states (p. 3), the basic facts of this case are not disputed. However, the factual summary contained in the Petition is so misleading in its brevity and partiality that a more complete and accurate statement is required.

In 1966, various banks in Chicago decided to establish a compatible charge card system in which a credit card issued by any one of the banks could be used for purchases from merchants who had a contract with any bank that was a member of the charge card system. A compatible system is designed to simplify the administration of a charge card program. If each bank issued its own separate non-compatible credit card, each merchant would have to accept many cards issued by different banks and then look to each individual bank for payment. Customers would have to seek out merchants willing to accept the particular bank card carried by the customer. With a compatible system, any merchant can accept the card of any member bank, but need deal only with his own bank to collect payment for purchases made. Customers, in turn, may deal freely with any merchant participating in the compatible charge card program. *See generally* 641 F.2d at 459 (Pet. App. A-6); 467 F. Supp. at 216-17 (Pet. App. B-44-46).

In launching the new credit card venture in the fall of 1966, the banks were each faced with the problem of large

*These two instances are quoted in the district court's initial opinion. 467 F. Supp. at 200, 211-12 (Pet. App. B-8, 33-34).

initial expenses. Several of the banks conducted independent internal studies each of which concluded that, even with an interest rate of 1½% per month (a rate commonly charged at that time by other consumer credit card issuers such as gasoline companies and retail establishments offering their own credit), the bank would sustain substantial losses for a period of years on its credit card operations. 641 F.2d at 461 (Pet. App. A-10-11); 467 F. Supp. at 201-202, 204-206 (Pet. App. B-10-12, 17-18, 20-21); 478 F. Supp. at 288-89 (Pet. App. C-8-10).

In establishing the compatible charge card system, the banks were acutely aware that antitrust questions could arise if they agreed among themselves upon the interest rates that they would charge their respective customers for deferred payment privileges. Thus, the banks employed antitrust counsel to assist them in establishing the charge card system. Counsel monitored the meetings of the study group planning the compatible system to ensure compliance with the antitrust laws. Moreover, a comprehensive memorandum was directed by counsel to "All Bank Personnel," limiting discussions with other banks to the exclusive subject of "planning a compatible credit card system," and specifically forbidding any discussion "even in jest" of "fees, discounts, billing and extended credit terms." 641 F.2d at 460 (Pet. App. A-8).

In 1966, the State of Illinois did not have a statute that expressly regulated the maximum interest rate that could be charged in connection with credit cards. The general Illinois usury rate was 7% per year; on installment loans, a lender, subject to certain requirements, was permitted to charge an additional 7% "add-on." Ill. Rev. Stat. 1965, ch. 74, §4a(a). Continental Bank and the First National Bank of Chicago, an alleged co-conspirator but not a defendant, independently inquired of the United States Comptroller of the Currency and received separate opinions indicating that the national

banks could charge interest rates that did not exceed those permitted to licensees under the Illinois Consumer Finance Act, Ill. Rev. Stat. 1965, ch. 74, §§ 19 *et seq.*, or an overall effective interest rate of approximately 1½% per month. 641 F.2d at 460-61 (Pet. App. A-9-10); 467 F. Supp. at 201 (Pet. App. B-11). Central and Pullman likewise concluded that 1½% per month was the maximum rate permissible. 478 F. Supp. at 288-89 (Pet. App. C-8-10). Nevertheless, there were no Illinois judicial decisions which sanctioned this interpretation of Illinois law.

A number of bills were introduced in the 1967 session of the Illinois General Assembly to regulate various aspects of credit card operations, including a bill that would have limited interest on charge cards to 1% per month, a bill that would have prohibited the mailing of unsolicited credit cards, and a bill that provided for a maximum monthly interest rate of 1½%. 641 F.2d at 461 (Pet. App. A-9-10). Mr. William R. Dillon was employed by Midwest early in 1967 to represent the interests of the banks in the Illinois legislature with respect to these and other bills. During its 1967 session, the Illinois General Assembly passed a measure which imposed a maximum interest rate of 1½% per month upon revolving credit arrangements. *Id.* That statutory provision, Ill. Rev. Stat. 1979, ch. 74, § 4.2, remained in effect from its enactment in 1967, although the Illinois legislature has recently passed a bill which would eliminate the interest rate ceiling.

In opposition to the banks' motions for summary judgment, petitioners submitted the affidavit of Dr. Bernard Shull. The affidavit makes various assertions concerning the alleged oligopolistic nature of the Chicago banking market and describes certain background details concerning the charge card program in which the banks were participants. It does not aver that the interest rates charged by the banks were the result of an unlawful price-fixing conspiracy. Rather, based upon his descriptions of the Chicago banking com-

munity and his outline of the various elements of the compatible charge card system, Dr. Shull concluded that "conscious cooperation" on the part of the Midwest members was the likely cause of the 1½% per month interest rate. 641 F.2d at 460 (Pet. App. A-9).

The Decisions Below

Based upon its review of the entire record, the district court concluded that, in light of the banks' business explanations for the interest rates that they had set and their consistent sworn denials of conspiratorial activities, the petitioners were required to come forth with significant probative evidence of conspiracy in order to defeat the banks' motions for summary judgment. The district court, holding that the petitioners had presented no such evidence, concluded:

> "[D]efendants' affidavits, deposition testimony, answers to interrogatories and documentary evidence show that Continental, Harris and American independently projected high start-up costs and early losses; they independently determined their respective programs required that the highest interest rate legally permissible be charged. The uncontradicted testimony of every bank employee consistently denies that interest rates were discussed among the alleged co-conspirators, or that interest rates were consensually determined. The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege." 467 F. Supp. at 210-211 (Pet. App. B-31).

The district court reached similar conclusions with respect to Central and Pullman. 478 F. Supp. at 295 (Pet. App. C-23-24).

The court of appeals also reviewed the entire record. The majority opinion stated that "[b]ased on our review of the record we, too, conclude that [petitioners] are unable to

point to any significant probative evidence in support of the allegations in the complaint." 641 F.2d at 458 (Pet. App. A-4-5).* Petitioners' petition for rehearing was denied, and no judge in regular active service requested a vote on petitioners' suggestion that the case be reheard *en banc.* (Pet. App. A-54.)

REASONS FOR DENYING THE WRIT

This case is wholly unremarkable, apart possibly from the length of time available to petitioners to attempt to uncover through the discovery process any significant probative evidence of conspiracy. It is totally devoid of any unusual or novel issues of law.

Indeed, the district court, the court of appeals' majority, and the dissenting judge were all in accord as to the interpretation of the applicable legal principles. Thus, all of the judges in the courts below were in agreement that the evidence, including the banks' business explanations for setting their interest rates as they did and their denials that they had engaged in a conspiracy to fix interest rates, was sufficient, under Rule 56 of the Federal Rules of Civil Procedure, to shift the burden to petitioners to produce significant probative evidence to support the allegations of their

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*The dissenting judge agreed with the majority that summary judgment was properly granted with respect to American National Bank. 641 F.2d at 480 (Pet. App. A-52). He pointed out, among other things, that by the time American issued its charge card in the spring of 1969, approximately 2½ years after the other banks (467 F. Supp. at 204 (Pet. App. B-16)), "the 18% credit card interest rate legislation had been in effect for two years" and "[e]very other bank seemed firmly set in its pattern of charging an 18% interest rate." 641 F.2d at 480 (Pet. App. A-53). The dissent also noted that American "did not participate in the lobbying activities with other defendants." *Id.* (Pet. App. A-52). The Petition does not challenge these facts or the unanimous decision of the panel as to American, and therefore American does not believe that petitioners seriously seek review of this case as it pertains to American.

complaint, and that, in order to infer the existence of a price-fixing conspiracy, petitioners had to come forth with evidence of more than merely parallel business conduct. *E.g.*, 467 F. Supp. at 208 (Pet. App. B-26); 641 F.2d at 462 (Pet. App. A-12-13) (majority opinion); *id.* at 475 (Pet. App. A-41) (dissenting opinion). These principles are fully in accord with the decisions of this Court. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

In addition, the district judge and all three judges in the court of appeals (including the dissenting judge) agreed that the underlying issue in this case is whether, on this record, petitioners had presented significant probative evidence to permit the factfinder rationally to infer that the interest rates resulted from a conspiracy, rather than from independent business decisions by the respective banks. Both of the courts below concluded that the record in this case is devoid of significant probative evidence of conspiracy.

Petitioners now seek to have this Court review the record once again to determine whether indeed it contains any significant probative evidence of conspiracy involving the banks. But this is surely a wholly insufficient reason to invoke the certiorari jurisdiction of this Court under Rule 17 of the Supreme Court Rules.

Petitioners contend that the decision of the court of appeals is in conflict with various decisions of this Court, including *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), and *Holland* v. *United States*, 348 U.S. 121 (1954), and with the Second Circuit's decision in *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980). *E.g.*, Petition, pp. 5-6. But, as we show below, the analyses of both this Court and those of other courts of appeals, including the Second Circuit, are entirely consistent with the decision of the court of ap-

peals in the instant case. In these circumstances, further review by this Court is plainly unwarranted.

1. The Court of Appeals Correctly Applied the Principles Established By This Court for the Review of Orders Granting Summary Judgment Motions in Antitrust Cases, and Correctly Concluded That Petitioners Had Not Presented Significant Probative Evidence To Support the Allegations of Their Complaint.

In *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court, in holding that the petitioner had not met the burden imposed upon him by Rule 56 of the Federal Rules of Civil Procedure to "set forth specific facts showing that there is a genuine issue for trial," stated as follows:

> "While we recognize the importance of preserving litigants' rights to trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding *the absence of any significant probative evidence* tending to support the complaint." *Id.* at 290. (Emphasis added.)

Petitioners seek to distinguish *Cities Service* solely on the untenable ground that that case involved an alleged conspiracy to refuse to deal, while this case involves an alleged conspiracy to fix prices in the form of interest rates. Although petitioners concede that any inferences drawn from parallel business behavior can be rebutted in concerted refusal-to-deal cases by a showing that the business context in which the behavior occurred renders an inference of unlawful conspiracy impermissible, they contend that a similar showing has not been, and should not be, permitted in price-fixing cases. Petition, p. i. Petitioners' purported distinction between price-fixing and concerted refusal-to-deal cases is fundamentally unsound. Indeed, in the very price-fixing cases

upon which petitioners most heavily rely, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), and *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980), both this Court and the Second Circuit searched the respective records (albeit in vain) for any evidence proffered by the defendants to explain, and thus to rebut the inferences drawn from, their identical conduct. *See* 306 U.S. at 224-26; 612 F.2d at 614-15. *See generally* pages 15-17, *infra*.

Petitioners' arguments, which are wholly without support in the decisions of this Court or any court of appeals, come perilously close to the obviously erroneous propositions that summary judgment should be eliminated as a procedural device in alleged price-fixing cases and that parallel pricing, without more, should be a sufficient basis for the imposition of antitrust liability. This Court in *Cities Service* expressly rejected the contention that Rule 56 "should, in effect, be read out of antitrust cases" (391 U.S. at 289); and this Court has explicitly rejected the contention that mere "parallel business behavior . . . constitutes a Sherman Act offense." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

The fallacies in petitioners' argument proceed from at least three basic misconceptions. First, petitioners misconstrue what the two lower courts did. Thus, they contend that the lower courts *required* them to show that the alleged price-fixing scheme was contrary to the economic interests of the banks. Petition, p. 7. Related to this argument is petitioners' apparent contention that the lower courts permitted the banks' sworn denials of conspiratorial activity "to stand as an absolute bar to price-fixing cases based on circumstantial evidence." Petition, p. 10 n.8. Second, petitioners contend that parallel pricing somehow occupies a position different from any other parallel business behavior (Petition, p. 9), and, therefore, the mere existence of parallel pricing should preclude the entry of summary judgment. Third, petitioners contend that the lower courts did not draw every conceivable

inference from the record in their favor. Petition, pp. 23-24, 26-29. None of petitioners' contentions is sound.

The sworn denials by the banks that they had engaged in any conspiratorial setting of interest rates (made largely in response to interrogatories propounded by petitioners or to questions at depositions initiated by petitioners) performed a limited, albeit important, function in this case. In light of these denials, it became incumbent upon petitioners "to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided." 467 F. Supp. at 209 (Pet. App. B-27), *quoting Lamb's Patio Theatre* v. *Universal Film Exchanges*, 582 F.2d 1068, 1070 (7th Cir. 1978). *Accord*, 641 F.2d at 462 (Pet. App. A-13) (majority opinion); *id.* at 475 (Pet. App. A-41) (dissenting opinion); *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 554 (5th Cir. 1980).

Thus, it was the proper function of the district court and of the court of appeals on review to examine the entire record to ascertain whether the petitioners had come forth with significant probative evidence of conspiracy.* Manifestly, neither court held that the probative value of petitioners' evidence of parallel pricing was "eliminated by the [banks'] conclusory sworn denials." Petition, p. 7. Rather, as the district court succinctly noted, "The question is whether the evidence *taken as a whole* warrants an inference of joint, consensual conduct rather than independent, individual action." 467 F. Supp. at 210 (Pet. App. B-30). (Emphasis added.) Similarly, the court of appeals concluded that "[b]ased on our independent review of the record, we . . . are unable to uncover any [significant probative] evidence" to support petitioners' conspiracy allegations. 641 F.2d at 461 (Pet. App. A-12).

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*See, e.g., *Baum* v. *Gillman*, 648 F.2d 1292, 1296-97 (10th Cir. 1981); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 883 (3d Cir. 1981); *Mutual Fund Investors* v. *Putnam Management Co.*, 553 F.2d 620, 624-25 (9th Cir. 1977).

Neither of the lower courts held, as the Petition insists (p. 7), that the petitioners were required to show that any alleged conspiratorial activity was contrary to the banks' economic interests. The district court instead held that this was simply *one method* by which petitioners could buttress any inferences that might be drawn from parallel business behavior. Thus, at the conclusion of its review of the record, the district court stated that petitioners had failed "*to produce significant probative evidence tending to support the complaint, or* evidence of action contrary to [the banks'] economic interests and of motivation to conspire, *or evidence of a 'plus factor' . . . .*" 467 F.Supp. at 214 (Pet. App. B-39-40). (Emphasis added.)*

In analyzing the record, the lower courts clearly considered petitioners' evidence of interest rate uniformity. No fair reading of the opinions below supports the view that the lower courts "disregard[ed]" this factor. Petition, p. 7. But parallel business behavior, without more, hardly permits an inference of conspiracy, and conspiracy is the very essence of a claim predicated upon Section 1 of the Sherman Act. As the Court stated in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*:

> "[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." 346 U.S. at 541.

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*Contrary to the suggestion in the Petition (p. 7), the court of appeals did not even mention the possibility that petitioners could defeat the motions for summary judgment by showing that the interest rates set by the banks were contrary to their economic interests.

Petitioners contend that parallel pricing is somehow unique and that stronger inferences can be drawn from parallel pricing than from any other form of parallel business behavior. The basic defect in this position is that parallel pricing, standing alone, simply does not permit an inference of conspiracy. *See, e.g., Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588, 605-606 (1925); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 896 (3d Cir. 1981); *Granddad Bread* v. *Continental Baking Co.*, 612 F.2d 1105, 1111 (9th Cir. 1979).

Moreover, parallel pricing as circumstantial evidence of conspiracy is especially lacking in probative value where, as here, the record clearly demonstrates that the product in question—the cost of money—is fungible, that the banks faced identical business problems, including exceptionally high costs, in initiating the charge card program, and that an interest rate of 1½% per month (then commonly charged by other credit card issuers) was thought by the banks to be the most that they could charge at the outset of the program in 1966 and was explicitly imposed as the maximum by state law in 1967. Clearly, "[r]easonable businessmen will act similarly when presented with the same problem." *United States* v. *Borden Co.*, 111 F. Supp. 562, 579 (N.D. Ill. 1953), *aff'd in part, rev'd in part on other grounds*, 347 U.S. 514 (1954). As the court of appeals stated:

> "In the instant case, the product in question is consumer credit, or more fundamentally, the cost of borrowing money for a given period. The underlying product—money—is not only fungible, it is by definition an interchangeable medium of exchange. The defendants' own cost of money is highly regulated and, on a given day and specified amount, the cost is uniform. Thus, it is hardly surprising, or significant, that the defendants charged a parallel interest rate given their parallel costs. We agree with the District Court's conclusion as to the only rational inference to be drawn from parallel pricing in this case:

'The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege.' " 641 F.2d at 463 (Pet. App. A-16). (Footnotes omitted.)

In so holding, the court of appeals was clearly correct. The courts have uniformly recognized that no inference of conspiracy can reasonably be drawn from the mere fact of parallel pricing where businessmen are dealing with a fungible product and are faced with identical economic realities. *E.g., Tose* v. *First Pennsylvania Bank,* 648 F.2d 879, 896 (3d Cir. 1981).* Indeed, this Court has long recognized that uniformity in the sale price of fungible products can not lead to an inference of collusive price-fixing because competition will ordinarily cause one producer to charge about the same price as that charged by any other. *See, e.g., United States* v. *International Harvester Co.,* 274 U.S. 693, 708-709 (1927); *Cement Mfrs. Protective Ass'n* v. *United States,* 268 U.S. 588, 605-606 (1925).

**Accord, Bendix Corp.* v. *Balax, Inc.,* 471 F.2d 149, 160 (7th Cir. 1972), *cert. denied* 414 U.S. 819 (1973); *Independent Iron Works* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963); *FTC* v. *Lukens Steel Co.,* 454 F. Supp. 1182, 1187-88 (D.D.C. 1978). *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 658-59 (1962).

Of all the cases cited or discussed in the Petition, *Tose* v. *First Pennsylvania Bank, supra,* which involved, *inter alia,* an alleged conspiracy by banks to fix interest rates, is more nearly identical to the present case than any other, as the Petition concedes (p. 12). Thus, far from showing a split in the circuits, the Petition itself demonstrates that the relevant decisions of the courts of appeals are wholly consistent and, we submit, entirely correct.

This court's decision in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), upon which petitioners heavily rely,* hardly suggests any other conclusion. That case involved a letter sent by two motion picture exhibitor chains to eight different distributors demanding that the distributors require that all exhibitors charge certain minimum prices for first-run films and that they not show such films as a part of a double feature. All of the distributors complied with this request. While the Court concluded that the record in that case supported an inference of conspiracy, there were critical factors present in *Interstate* which are absent here. First, and perhaps most importantly, the *Interstate* defendants failed to offer any reasonable explanation for their identical conduct (306 U.S. at 223-26), sharply distinguishing it from the instant case. Second, the success of the combination depended on absolute compliance on the part of all defendants, each of which knew that an identical letter had been sent to

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*The Petition (p. 11) cites various cases for the proposition that, "in the uniform pricing situation, conscious parallelism can be strong circumstantial evidence of conspiracy." These cases were examined by the lower courts, *e.g.*, 467 F. Supp. at 213-14 (Pet. App. B-38-39), and were all found, correctly we submit, to be distinguishable from the instant case because they contained "plus factors," *in addition to* parallel pricing, from which the existence of a conspiracy could be reasonably inferred. So, also, in *Beatrice Foods Co.* v. *United States*, 312 F.2d 29 (8th Cir. 1963) (Blackmun, J.), upon which the Petition relies (p. 13 n.*), the evidence of price-fixing, wholly apart from parallel pricing, was substantial. *Inter alia*, bids submitted for sale of milk and cream to two institutions showed considerable disparity during the pre-conspiracy and post-conspiracy periods, but remarkable uniformity during the conspiracy period; there was direct evidence of price discussions among the co-conspirators; and no effort was made by the defendant to explain or rebut the evidence regarding pricing. 312 F.2d at 43-45. In those circumstances, it is hardly surprising that the court of appeals concluded that, even though a fungible product was involved, there was sufficient evidence to sustain the verdict for the Government.

the others.* Third, the letters were sent by large exhibitors, alleged co-conspirators, which dominated their markets, causing the other defendants to react immediately and favorably to the request.** Fourth, the defendants had failed to deny the existence of a conspiracy. 306 U.S. at 225-26. In light of these distinctions, it is wholly inaccurate to assert, as the Petition does (p. 7), that the decision of the court of appeals in this case "effectively overrules" *Interstate Circuit.*

Petitioners' reliance on *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980), is likewise misplaced; indeed the Second Circuit's legal analysis there supports the banks' position here. The plaintiff in *Ambook* alleged that certain advertising agencies and publication media conspired to violate Section 1 of the Sherman Act by agreeing that advertisements placed through selected agencies should receive a 15% "agency discount," while direct advertisers (such as plaintiff) should receive no discount. The court of appeals pointedly noted that no evidence whatever had been offered by the defendants to explain their parallel action in granting the agency discount. 612 F.2d at 614-15. The parallel action, involving literally hundreds of participants, thus stood unexplained in the record. The court carefully pointed out that a defendant could explain away any inference from parallel conduct by evidence of legitimate business considerations, thereby negat-

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*Significantly, the two conditions proposed in the letters constituted a radical business change opposed by the local managers for at least three distributors (*id.* at 222), and, therefore, allowed the inference that the proposed action was contrary to the economic self-interest of each distributor acting independently, and only made economic sense if all agreed to impose the conditions together.

**The request was transmitted directly from two conspirators (the movie chains) to the others (the eight distributors). 306 U.S. at 216. As the court of appeals noted in *United States* v. *Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963), the "invitation" referred to in *Interstate* "was a solicitation to act in concert."

ing any inference of conspiracy. *Id.* at 615. Moreover, in *Ambook* the record revealed strong "plus factors," in addition to parallel conduct, which the court concluded tended to show the use of "coercion" and the existence of "fears of reprisal" in the implementation by defendants of the dual rate system. *Id.* at 616-17. The court also noted that "there was at least one question of credibility on a point of some importance." *Id.* at 611. Under all of these circumstances, the court of appeals concluded that summary judgment for the defendants had been improperly granted.

Quite apart from the factual dissimilarity between *Ambook* and the instant case, it is important to emphasize that the court of appeals in *Ambook*, a price-fixing case, relied upon this Court's analysis of summary judgment standards in *Cities Service* to determine whether the record contained significant probative evidence to support an inference of conspiracy. While the court of appeals concluded that the record in that particular case did support such an inference, the court's analytical approach, and especially its reliance upon *Cities Service*, clearly demonstrates that it perceived no relevant distinction between price-fixing and refusal-to-deal cases for purposes of determining the propriety of granting a motion for summary judgment. The inquiry in both situations is the same: Does the record contain significant probative evidence from which a trier of fact could reasonably infer that the actions of the defendants resulted from conspiracy, rather than from independent business judgments? This is precisely the approach followed by the court of appeals in the instant case.

Petitioners also contend, relying on *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), and *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), that the court of appeals failed to draw every conceivable inference from the evidence in their favor. Petition, pp. 23-24. The basic error in petitioners' position is that where, as here, the facts are undisputed (Petition, p. 3), the task of the district court,

and of the court of appeals on review, is to determine the *reasonable* inferences that can be drawn from the uncontradicted evidence. If such reasonable inferences do not support a plaintiff's allegations of conspiracy, summary judgment for the defendant must be granted. *E.g., American Telephone and Telegraph Co.* v. *Delta Communications Corp.*, 590 F.2d 100 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979).* Thus, the district court correctly held that "inferences drawn from circumstantial evidence must be logical and reasonable, not based on speculation and conjecture." 467 F. Supp. at 210 (Pet. App. B-30-31). This position is fully in accord with the views expressed in *Galloway* v. *United States*, 319 U.S. 372, 395 (1943), where this Court, in affirming a directed verdict for the defendant, stated that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Accord, Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894-95 (3d Cir. 1981); *Edward J. Sweeney & Sons* v. *Texaco*, 637 F.2d 105, 110-11 (3d Cir. 1980); *British Airways Board* v. *Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

In these circumstances, it was entirely appropriate for both the district court and the court of appeals to consider the inferences that could be drawn from the undisputed facts and to conclude that the *reasonable* inferences that could be drawn from the facts of record did not constitute significant probative evidence of conspiracy appropriate for submission to a trier of fact. This was precisely the procedure that was followed in *Cities Service*, where this Court, after analyzing the evidence that had been presented by both parties, stated:

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*As the court of appeals there noted, "If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred." 590 F.2d at 102.

> "Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, *but the former inference is more probable.*" 391 U.S. at 280. (Emphasis added.)

As in *Cities Service*, the courts below examined the record and concluded that the inferences that petitioners seek to draw from the undisputed facts were simply too remote and speculative to withstand the motions for summary judgment, particularly in light of the business explanations given by the banks for their interest rates, the economic realities that each bank faced in launching the new credit card venture, and the fact that the 1½% interest rate (commonly used by other credit card issuers) was thought by the banks to be the maximum available in 1966 under Illinois law and was expressly imposed as the maximum by statute in 1967.

Indeed, the vast bulk of petitioners' evidence fell within the range of mere "opportunity" evidence. This evidence suggested that, because various bank officers were engaged in common business or civic endeavors and because the banks cooperated in the establishment of the Midwest bank card system, they had the *opportunity* to conspire. But, as the court of appeals correctly held, the "mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence of conspiracy." 641 F.2d at 462 (Pet. App. A-14).*

Petitioners also argue that the majority opinion, by referring to *Pevely Dairy Co.* v. *United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950), incorrectly incorporated the *Pevely* case into its analysis of the standards

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Accord, id. at 477 (Pet. App. A-47) (dissenting opinion); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir. 1981); *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975); *Overseas Motors, Inc.* v. *Import Motors Ltd.*, 375 F. Supp. 499, 535 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

governing summary judgment motions. Petition, pp. 20-22. But the majority's reference to *Pevely* (641 F.2d at 463 (Pet. App. A-15)) does not occur in connection with its discussion of the standards to be employed in deciding summary judgment motions, for, as noted *supra*, pp. 7-8, the majority and dissenting opinions are in accord with respect to the basic principles applicable to this case. Indeed, the dissenting opinion does not even mention the majority's treatment of the *Pevely* case. Rather, the majority's reference to *Pevely* occurs in the context of its discussion of parallel pricing and its express rejection of the notion that parallel pricing, together with an opportunity to conspire, is sufficient to require a trial on the merits. This discussion contrasts the factual background of *Pevely*, involving an essentially fungible product, milk, with cases relied upon by petitioners, including *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir. 1952), which expressly distinguishes *Pevely* on the basis of the nature of the product involved in the two cases. The contrast between *Pevely* and *C-O-Two* was used by the majority to illustrate the wholly non-controversial principle that "parallel pricing or conduct lacks probative significance when the product in question is standardized or fungible." 641 F.2d at 463 (Pet. App. A-15). (Citations omitted.) *See generally* pages 13-14, *supra*.

The Petition also contends that the jury instructions given in *Pevely** were disapproved by the Court in *Holland* v.

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*The jury instructions approved by the court of appeals in *Pevely* contained the following statement:

> "Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion." 178 F.2d at 367.

The majority opinion in this case expressly recognized that *Pevely*, as a criminal case, involved "differing standards of proof" from the instant case. 641 F.2d at 463 (Pet. App. A-15).

United States, 348 U.S. 121 (1954), but reliance upon *Holland* in this case is misplaced. In *Holland*, the Court simply stated that, where the jury in a criminal case is properly instructed on the requirement of proof beyond a reasonable doubt, an additional instruction on circumstantial evidence is unnecessary and may be confusing to the jury. 348 U.S. at 139-40. In this case, the majority used the *Pevely* case, not to analyze a jury instruction, but rather to emphasize the need for careful scrutiny of circumstantial evidence to ensure that a trier of fact, in analyzing the inferences that can be drawn from such evidence, does not engage in rank conjecture or speculation. This position is fully consistent with the views of this Court and of other courts of appeals,* and with the application of summary judgment principles set forth by the Court in *Cities Service*.

2. The Court of Appeals, in Affirming the Motions for Summary Judgment, Properly Considered, and Rejected, Petitioners' Arguments Concerning Their Lobbying Evidence and the Affidavit of Their Economist.

A. Lobbying evidence.

In deciding the motions for summary judgment, the district court declined to consider petitioners' evidence relating to certain lobbying activity undertaken by Midwest "in light of its minimal probative value as well as inevitable prejudicial effect on a jury." 467 F. Supp. at 208 n.22 (Pet. App. B-25). The court of appeals, relying on Rule 403 of the Federal Rules of Evidence, held that this ruling of the district court was correct. 641 F.2d at 466-67 (Pet. App. A-22-24).

There is no question that, in 1966, the issue of the maximum interest rate that could be charged on bank charge

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*See, e.g., *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-44 (1933); *Edward J. Sweeney & Sons* v. *Texaco*, 637 F.2d 105, 116 (3d Cir. 1980); *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767, 777 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Wesson* v. *United States*, 127 F.2d 931, 933 (8th Cir. 1949).

cards in Illinois had not been resolved by any definitive judicial or legislative decision. The banks concluded, based upon the advice of counsel and/or opinions of the Comptroller of the Currency, that 1½% per month was the maximum rate they could charge. *See* pages 4-5, *supra*.* Nevertheless, none of the banks could, with complete assurance, rely upon the 1½% figure, or any other rate, as being legally permissible. Furthermore, a large number of bills were introduced in the Illinois legislature in 1967 which would have affected the proposed charge card operation. In these circumstances, it was necessary for Midwest to present the views of the banks to the legislature. This was done through the employment of Mr. William R. Dillon. 641 F.2d at 461 (Pet. App. A-9-10).

No one disputes that this lobbying activity was entirely lawful under the decisions of this Court in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961). *See First National Bank of Omaha* v. *Marquette National Bank*, 636 F.2d 195 (8th Cir. 1980). Nevertheless, the Petition (pp. 14-15), relying on a footnote in *Pennington*, reiterates the contention rejected below that a jury should be permitted to consider the constitutionally-protected lobbying activity as evidence that the banks entered into an unlawful price-fixing conspiracy.

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*The argument in the Petition (p. 17) that there was no explicit maximum interest rate in Illinois in 1966 for charge cards is quite beside the point. The evidence is uncontradicted that each bank independently concluded that it would have to charge the highest rate that was legally permissible. In light of the uncertainty of Illinois law, each of the banks independently concluded that the highest rate for which sound legal arguments could be marshalled in support was 1½% per month. Whether the opinions or legal analyses relied upon by any of the banks in this respect were correct is simply irrelevant. The critical fact is that each of the banks perceived in 1966 that the highest rate which was legally defensible was 1½%.

In the first instance, petitioners fail to note that the *Pennington* footnote (381 U.S. at 670 n.3) is directed solely to the discretion of the district court. The Court in *Pennington*, holding that lobbying evidence had been improperly admitted in the absence of an appropriate instruction, stated that "[i]t would of course still be within the province of the trial judge to admit this evidence, *if he deemed it probative and not unduly prejudicial . . . .*" *Id.* (Emphasis added.) Thus, the *Pennington* footnote is directed precisely to the district court's discretion, *Lamb Enterprises* v. *Toledo Blade Co.*, 461 F.2d 506, 516 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972), and no abuse of that discretion has been shown here.

The Petition asserts (p. 15) that the court of appeals misinterpreted Rule 403 of the Federal Rules of Evidence, which permits the district court to exclude evidence if, *inter alia*, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In this connection, petitioners argue that the rule is intended to apply only to evidence that tends to inflame the passions of the jury. This position is plainly wrong. As the Notes of the Advisory Committee state with respect to Rule 403,

> "The case law recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. . . .
>
> "Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. *'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.*" Notes of Advisory Committee on Proposed Rules, Title 28, U.S.C.A., Rule 403. (Emphasis added.)

Thus, evidence has been excluded where the concern of the court was that the evidence in question would confuse the issues presented to the jury. *E.g., Estate of Le Baron* v. *Rohm and Haas Co.*, 506 F.2d 1261, 1263-64 (9th Cir. 1974);* *Apicella* v. *McNeil Laboratories*, 66 F.R.D. 78, 86-87 (E.D.N.Y. 1975) (Weinstein, J.).

In view of the complete discovery record in this case, the district court was obviously in a position to place the lobbying evidence in its proper context (*see* pages 4-5, *supra*) and to conclude that its probative value was "minimal." 467 F. Supp. at 270 n.22 (Pet. App. B-25). Moreover, as the court of appeals held, because of "the lack of any substantial evidence of an antitrust conspiracy in the instant case" (641 F.2d at 467 (Pet. App. A-24)), introduction of the lobbying evidence would create a particularly confusing situation for a jury. The jury would have to be instructed that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 670. Thus the jury would simply be left to speculate whether entirely lawful conduct constituted evidence of an unlawful conspiracy separate from the constitutionally-protected activity. *See United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440, 453 (E.D. Pa. 1966). In these circumstances, the court of appeals correctly held that the lobbying evidence "could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which

*In *Le Baron*, the court of appeals relied on proposed Rule 403 in holding that the district court, in post-trial proceedings, properly ruled inadmissible certain data relating to defendants' costs and profits because the probative value of this relevant evidence on the question of the existence of a price-fixing conspiracy "was slight and was clearly outweighed by the difficulties the submission of this evidence would have brought to a jury trial." *Id.*

Noerr-Pennington protects." 641 F.2d at 467 (Pet. App. A-24).*

Moreover, the basic thrust of petitioners' argument leads directly to the absurd result that the district court, having concluded that the probative value of the lobbying evidence was "minimal" and that its prejudicial effect was "inevitable," should nevertheless have used the evidence to find the existence of a material issue of fact. There is no authority for such a wholly useless procedure.**

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*It is difficult to comprehend what comfort petitioners obtain from their reliance on *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977), and *Household Goods Carriers' Bureau* v. *Terrell*, 452 F.2d 152 (5th Cir. 1971). Petition, p. 15. Both cases directly involved allegations that the defendants had improperly sought assistance from government agencies in an effort to eliminate the plaintiffs as competitors. Indeed, in *Webb*, the court of appeals invoked the "sham" exception to the *Noerr-Pennington* doctrine, holding that defendants' activities "were designed to and succeeded in bringing about a boycott of the plaintiffs . . . ." 568 F.2d at 676. Yet petitioners have expressly disavowed reliance upon the "sham exception" to *Noerr-Pennington*. Petition, p. 15.

**Petitioners apparently believe that it was inappropriate for the district court to have determined the inadmissibility of the lobbying evidence outside the context of an actual trial. But the very purpose of summary judgment procedures is to ascertain whether there is sufficient *admissible* evidence which demonstrates the existence of a material issue of fact. *E.g.*, *Jones* v. *Menard*, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977). Thus, "in ruling on a motion for summary judgment, only evidence or statements that would be admissible at a trial and having probative force, may be considered." *First National Bank Co.* v. *Insurance Co.*, 606 F.2d 760, 766 (7th Cir. 1979). *See* 6 *Moore's Federal Practice* ¶ 56.11 [1.--8] (2d Ed. 1976), at pp. 56-205--56-207. For this reason, decisions concerning the admissibility of evidence are frequently made at the summary judgment stage. *E.g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*,

(Footnote continued on next page)

Fundamentally, what petitioners are complaining about is the exercise of the district court's discretion, already reviewed by the court of appeals, concerning the probative value and prejudicial impact of certain specific evidence presented in the context of a particular case. But it is clearly inappropriate to request this Court to review discretionary evidentiary rulings by district judges, particularly when the ruling in question has already been thoroughly examined by the court of appeals.

B. Affidavit of petitioners' economist.

Petitioners assert that the majority opinion ignores their economic "evidence," specifically an affidavit submitted by Dr. Bernard Shull. Petition, pp. 25-26. To the contrary, not only did the opinion of the district court discuss this affidavit at length (467 F. Supp. at 212-13 (Pet. App. B-34-38)), but the majority opinion of the court of appeals twice refers expressly to Dr. Shull's opinion and the district court's conclusions with respect to it. 641 F.2d at 460-61 (Pet. App. A-9-10).

The Shull affidavit clearly fails to "set forth specific facts showing that there is a genuine issue for trial" as required by Rule 56. While the affidavit makes various assertions concerning the alleged oligopolistic nature of the Chicago banking market and describes certain background details concerning

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(Footnote continued from previous page)

632 F.2d 539, 556-58 (5th Cir. 1980); *Jones* v. *Menard, supra; American Securit Co.* v. *Hamilton Glass Co.*, 254 F.2d 889, 893 (7th Cir. 1958); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 513 F. Supp. 1100, 1117-18, 1135-39 (E.D. Pa. 1981). *See also Estate of Le Baron* v. *Rohn and Haas Co., supra*, 506 F.2d at 1263-64; *Apicella* v. *McNeil Laboratories, supra*, 66 F.R.D. at 86-87 (pre-trial order holding evidence inadmissible under Rule 403). Thus, petitioners' contention that the district court in this case could not properly rule upon the admissibility of the lobbying evidence outside the context of an actual trial is simply without merit.

the charge card program in which the banks were participants, the affidavit does not, as it could not, aver that the interest rates were the result of an unlawful price-fixing conspiracy. Indeed, the affidavit's conclusory, and clearly speculative, statement to the effect that "conscious cooperation" was the likely cause of the 1½% interest rate is based upon little more than the affidavit's prior statements regarding the supposedly oligopolistic nature of the Chicago banking market. Petitioners' attempt to infer a conspiracy from the existence of a particular market structure was cogently answered by the district court as follows:

> "Plaintiffs' argument regarding market structure . . . is simply a variation of their argument regarding opportunity to conspire. Plaintiffs argue that the market structure of the Chicago banking industry in 1966 was oligopolistic and therefore conducive to collusion. Even assuming this characterization to have merit, it cannot constitute a 'plus factor' sufficient to bar summary judgment. The fact that market structure might have permitted collusion does not allow the inference that collusion occurred where, as here, defendants have offered sworn, credible denials of the existence of conspiracy and years of discovery by plaintiffs has uncovered no affirmative evidence of this kind of conduct." 467 F. Supp. at 212 (Pet. App. B-35).

Dr. Shull's affidavit differs markedly from that considered in *Bieghler* v. *Kleppe*, 633 F.2d 531 (9th Cir. 1980), upon which the Petition relies (p. 26). In that case, the court of appeals noted that

> "[t]he accident reconstruction expert described in his affidavit the tunnel accident and its cause as he had reconstructed them. The expert did more than conclude that defendants' negligence in lighting the tunnel *might* have caused the accident. He purported to determine that *the* cause of the accident was defendants' negligence." 633 F.2d at 534. (Emphasis in original.)

Indeed, the Shull affidavit more nearly resembles the testimony that was rejected by this Court in *United States* v.

United States Steel Corp., 251 U.S. 417 (1920), where the Court, affirming a judgment for the defendant, stated the following with respect to the opinion testimony of plaintiffs' expert witness concerning pricing:

> "His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. . . . Of course competition affects prices but it is only one among other influences and does not more than they, register itself in definite and legible effect." 251 U.S. at 448-449.

Petitioners also insist that the majority opinion failed to consider evidence of the banks' "obvious economic motive to conspire," stating that "[t]he record is clear that the banks feared the entry of any bank credit card at a lower rate than had been planned because they would then have been forced to market their cards at the lower rate as well." Petition, p. 25. While the record is indeed clear, it is not as petitioners have described it. As the court of appeals' opinion expressly demonstrates (641 F.2d at 465-66 Pet. App. A-20-21), the concern expressed by some of the banks with respect to possible chaotic market conditions had nothing to do with interest rates. Rather, the concern was that, if each bank issued its own non-compatible card, merchants would have to accept many cards issued by different banks (rather than one compatible card) and then would have to look to each individual bank for payment. The use of a compatible charge card was designed to simplify the administration of the charge card program. Most importantly, there is absolutely no evidence that the compatability features of the charge card program,

dealing with the interchange of charge slips, credits, and the like, had any relationship to, or effect upon, the interest rates that each bank charged.

In the same vein, petitioners assert that it was unnecessary for the banks to create a compatible charge card system and that their actions have therefore created "artificial product standardization." Petition, p. 25. But the creation of the compatible charge card system, which even petitioners do not attack as unlawful, was clearly a matter of business judgment for the banks. Thus, the emphasis upon the Shull affidavit simply diverts attention from the main point: There is no significant probative evidence of a conspiracy to fix interest rates.

The long and short of the matter is that petitioners' economic "evidence" has nothing to do with this case.* Petitioners apparently forget that this is a private treble damage action brought by purportedly aggrieved individuals who think that they are paying too much for credit. This is not a proceeding brought by the Government attacking an allegedly monopolistic venture. Thus, petitioners' contentions to the contrary notwithstanding, questions of market power, oligopoly, or product standardization are clearly beside the point. The charge is a conspiracy to fix interest rates. As to this issue, petitioners have engaged in a ten-year fishing expedition and have returned empty-handed.

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*See *Zenith Radio Corp.* v. *Matsushita Electronic Industrial Co.*, 513 F. Supp. 1100, 1187 (E.D. Pa. 1981), where the district court, granting defendants' motion for summary judgment in a multifaceted antitrust case, stated the following with respect to the proffered evidence concerning the defendants' market power:

> "It is clear beyond peradventure that plaintiffs' allegations about the combined economic power of the defendants and their cartel is 'bootstrapped' and is in any event utterly of no probative value in drawing an inference of the conspiracy alleged by plaintiffs."

CONCLUSION

After literally years of discovery, petitioners identified the precise evidence upon which they would rely at trial to support their allegations of a conspiracy to fix interest rates involving the banks. The district court, in accordance with this Court's decision in *Cities Service*, thoroughly examined the record and concluded that petitioners had failed to come forth with significant probative evidence to support their conspiracy allegations. The court of appeals, after its independent examination of the record, reached the same result. The decision of the court of appeals is fully in accord with the decisions of this Court and is entirely consistent with the decisions of other courts of appeals. No basis has been shown for further review of this case by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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